

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE)	
1130 Seventeenth Street, N.W.)	
Washington, D.C. 20036-4604)	
(202) 682-9400,)	
)	
Plaintiff,)	
)	
vs.)	Case Number:
)	
UNITED STATES BORDER)	
PATROL)	
U.S. Customs and Border Protection)	
1300 Pennsylvania Avenue N.W.)	
Washington, D.C. 20229,)	
)	
and)	
)	
BUREAU OF CUSTOMS AND)	
BORDER PROTECTION)	
1330 Pennsylvania Avenue, N.W.)	
Washington, D.C. 20229,)	
)	
and)	
)	
U.S. DEPARTMENT OF)	
HOMELAND SECURITY)	
Washington, D.C. 20528,)	
)	
Defendants.)	
)	
)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging the United States Border Patrol's failure to produce information responsive to plaintiff's request for records concerning the environmental effects of the Border Patrol's activities in southern Arizona. Plaintiff requested, among other things, documents related to environmental effects on protected

federal public lands including designated Wilderness areas, National Wildlife Refuges, National Monuments, and National Forests, as well as the effects to the endangered Sonoran pronghorn, jaguar and other species listed under the Endangered Species Act, 16 U.S.C. § 1531, et seq. caused by Border Patrol activities.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Defenders of Wildlife (“Defenders”) is a Washington, D.C. based nonprofit corporation. Defenders has more than 430,000 members worldwide. Defenders mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders also publishes an online news alert that reaches over one million subscribers concerning these issues.

4. For more than a decade, Defenders has invested considerable resources towards the protection of Sonoran desert ecosystems and its imperiled wildlife. This wildlife includes the federally-listed Sonoran pronghorn and cactus ferruginous pygmy-owl, and non-listed wildlife species such as bighorn sheep and flat-tailed horned lizard. Much of the remaining habitat for these species exists in areas impacted by intensifying Border Patrol operations within Arizona.

5. Additionally, Defenders has for many years prioritized the protection of specially-designated public lands, including lands protected under the National Wildlife Refuge System and the National Wilderness Preservation System. As is the case with imperiled species, many protected lands within Arizona have been increasingly impacted by Border Patrol operations. According to the Arizona Daily Star and the Washington

Post, the Border Patrol has apparently requested unrestricted off-road vehicle access within all public lands along the Arizona border. See “Protecting the Parks Along the Border; Plans to Stop Smuggling of Drugs, Immigrants May Trample Lands.” Washington Post, April 26, 2004; “Bid to Ride Roughshod; Border Patrol is Seeking Total Access to Treasures.” Arizona Daily Star, April 25, 2004.

6. As little is publicly known about Border Patrol operations on the Mexico-Arizona border, Defenders has been attempting to collect information under the FOIA regarding the effects of Border Patrol activities on the border environment and on wildlife found in the area, as well as the overall environmental effect of such Border Patrol operations. Further, Defenders has also been attempting to collect information concerning the Border Patrol’s requests for unrestricted off-road vehicle access for Border Patrol vehicles.

7. Defenders has been harmed by the Border Patrol’s failure to locate and release responsive records. Defenders has been further harmed by the Department of Homeland Security’s failure to respond to Defenders’ FOIA appeal. These failures have harmed Defenders’ ability to provide full, accurate, and current information on this issue to its members, as well as its ability to advocate on behalf of the many imperiled species and protected public lands harmed by the Border Patrol’s activities. Thus, Defenders brings this action on its own institutional behalf and also on behalf of its members.

8. Defendant United States Border Patrol is an agency of the U.S. Department of Homeland Security, and has possession and control of the records plaintiff seeks.

9. Defendant Bureau of Customs and Border Protection is an agency of the U.S. Department of Homeland Security, and has possession and control of the records plaintiff seeks.

10. Defendant Department of Homeland Security is a cabinet-level agency of the executive branch, and is responsible under the FOIA and its own implementing regulations for responding to administrative appeals concerning FOIA requests to the Border Patrol.

STATUTORY FRAMEWORK

11. The FOIA, 5 U.S.C. § 552, as amended, requires agencies of the federal government, upon request, to release information to the public. The FOIA carries a presumption of openness and disclosure, and allows agencies to withhold responsive information only if one of nine specific statutory exemptions apply.

12. The FOIA requires federal agencies to search for, and make available, responsive records to any request that reasonably describes the records sought. Under the FOIA, “search” means to “review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. § 552(a)(3)(D). The agency must conduct a search reasonably calculated to uncover all relevant documents.

13. When an agency denies a FOIA request in whole or in part, or otherwise makes an adverse determination related to the request, the agency must inform the requester of the reasons for the denial, the name and title of each person responsible for the denial, and of the requester’s right to appeal the denial. 5 U.S.C. § 552(a)(6)(A)(i). An agency’s “no records” response constitutes an “adverse determination” and therefore requires notification of appeal rights. See Oglesby v. United States Dep’t of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

14. Under Department of Homeland Security regulations, appeals of adverse Border Patrol determinations under FOIA must be made within 60 days of the letter denying a request and must be filed with the Department’s Associate General Counsel in

Washington, D.C. 6 C.F.R. § 5.9(a)(1). An agency, such as the Department of Homeland Security, must make a determination on an administrative appeal within twenty working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

15. Agency failure to act within applicable time limit provisions of the FOIA or to timely respond to administrative appeals constitutes an exhaustion of administrative remedies for the purposes of administrative review. 5 U.S.C. § 552 (a)(6)(C)(i).

FACTUAL BACKGROUND

16. The Arizona border with Mexico spans approximately 370 miles along the state's southern boundary. The majority of this area consists of Sonoran desert habitat, interspersed with mountainous and forested country. Cities along the Arizonan border region include Yuma, Nogales and Douglas.

17. Many areas of federally-owned public land are located along the Arizona border region, including National Wildlife Refuges, National Monuments and National Forests. Many of these public lands contain federally designated and protected Wilderness areas. These areas of public land along the border include: the Cabeza Prieta National Wildlife Refuge, the Organ Pipe Cactus National Monument, the San Pedro River National Riparian Conservation Area, the Buenos Aires National Wildlife Refuge, the San Bernadino National Wildlife Refuge, the Leslie Canyon National Wildlife Refuge, and several units of the Coronado National Forest. Additionally, lands administered by the Tohono O'Odham Nation encompass large areas of the Arizona border.

18. The Sonoran desert, including these public lands, harbor extraordinary levels of biological diversity, including many imperiled and rare species of wildlife, plants, and birds. Sonoran pronghorn, cactus ferruginous pygmy-owl, and lesser long-nosed bat, each listed under the Endangered Species Act, all depend on habitat within

public lands along the Arizona border for their continued existence and survival, as well as their eventual recovery.

19. Since the early 1990s, the Border Patrol has increased its drug and immigration enforcement efforts within heavily urbanized areas along the U.S.-Mexico border. These areas include San Diego, California; Nogales, Arizona; and El Paso, Texas. These efforts, which include the deployment of thousands of additional agency personnel as well as an increase in the amount of infrastructure, such as the construction of roads, walls, and fences, have diverted both immigration and drug trafficking to more remote and environmentally fragile areas.

20. In response to this shift, the Border Patrol has had to also escalate enforcement efforts in remote areas. The agency recently announced its largest expansion of such efforts to date in Arizona, an effort they call “the Arizona Border Control Initiative.” The Border Patrol publicly stated that this effort would include the addition of 250 new agents, deployment of unmanned aerial vehicles, and the addition of new helicopters and other aircraft. See U.S. Customs and Immigration Enforcement “Arizona Border Control Fact Sheet”, March 16, 2004. See http://www.ice.gov/graphics/news/factsheets/bordercontrolfs_031604.htm (last visited October 18, 2004).

21. According to the Washington Post on April 26, 2004 and the Arizona Daily Star on April 25, 2004, in addition to these publicly announced facets of the Arizona Border Control Initiative, the Border Patrol has also been requesting, privately and behind closed doors, that federal land managers along the border area, including Department of Interior, Department of Agriculture, and National Park Service, provide the agency with unrestricted access for off-road and other motorized vehicles within

National Wildlife Refuges, National Monuments, National Forests, designated Wilderness areas, and all other public lands.

22. Such requests have not been officially included or publicly announced as part of the Initiative, or, to the best of our knowledge, undergone analysis under environmental laws such as the National Environmental Policy Act, Endangered Species Act, or Wilderness Act.

THE FOIA REQUESTS

23. On April 28, 2004, Plaintiff Defenders submitted a FOIA request to the Tucson and Yuma sectors of the Border Patrol for records relating to the Arizona Border Control Initiative and compliance with environmental laws; for records of Biological Assessments completed by the Border Patrol to fulfill its obligations under the Endangered Species Act; for records of correspondence between the Border Patrol and federal land management agencies with jurisdiction over lands impacted by Border Patrol activities; for records of correspondence with Congressional representatives; and for records relating to discussion of alternatives to the Arizona Border Control Initiative.¹

24. Plaintiff requested such documents because the Border Patrol's Arizona Border Control initiative, including its apparent attempt to gain unrestricted motorized access to public lands and protected areas such as designated Wilderness, poses substantial risks both to those lands and to the many imperiled species which depend on them, and because no information has been provided to the public regarding the requests. As discussed above, Defenders has devoted considerable resources to the protection of both wildlife and public lands along the Arizona border.

¹ Plaintiff also sent this request to the Phoenix and Washington, D.C. Offices of the U.S. Citizenship and Immigration Service. These offices have not responded to the request, however, they are not at issue in this litigation.

25. On May 4, 2004, the U.S. Citizenship and Immigration Services (“CIS”) Laguna Niguel, California office, which was not a recipient of the FOIA request, responded on behalf of the Border Patrol’s Tucson and Yuma sector offices. CIS stated that if records existed, they would be maintained at the Bureau of Customs and Border Protection in Washington, D.C.

26. On May 11, 2004, Border Patrol counsel James DeVito confirmed in a telephone conversation that this letter should be considered as a “no records” response from the Border Patrol. Defendants has never received a response to its FOIA request from the Border Patrol itself, nor was Defendants ever informed of its right to appeal this response, as required by FOIA.

27. Although Plaintiff believes that responsive records are maintained by the Border Patrol’s Tucson and Yuma sectors, Plaintiff also sent a FOIA request to the Bureau of Customs and Border Protection’s Washington D.C. Office on May 12, 2004, as advised to do by the CIS’s May 4, 2004 letter. The May 12, 2004 letter requested the same items as the Plaintiff’s April 28, 2004 letter described above. The Bureau has neither responded to nor acknowledged this request.

28. Through separate requests under the FOIA to other federal agencies such as the U.S. Fish and Wildlife Service and the National Park Service, Plaintiff has received documents which clearly demonstrate that the Border Patrol has documents responsive to plaintiff’s FOIA request, yet no documents have been provided by the Border Patrol itself.

29. Documents received from other federal agencies in response to FOIA requests include: (1) “Yuma Working Group Kick-off Meeting Notes,” from a meeting held at the Border Patrol’s Yuma Sector February 18, 2004 and during which the priorities of the Yuma Sector were discussed with federal agency representatives from the

U.S. Fish and Wildlife Service and Bureau of Land Management; (2) “Yuma Sector Border Barrier Infrastructure Projects,” dated February 18, 2004, of which only the title page was provided with a handwritten note stating “Contact Border Patrol Yuma sector for copy of this document”; (3) Yuma Border Patrol Sector Cooperative Efforts,” dated February 17, 2004 and identifying “constant communications between agencies as to illegal activities in mutual areas of responsibility” as a priority. Each of these documents indicates that the Border Patrol should have extensive material responsive to Plaintiff’s request for correspondence with other federal agencies.

30. Additionally, Plaintiff has also received documents from other federal agencies in response to FOIA requests summarizing “Plan Arizona” proposed actions. These documents reveal the actions of the Border Patrol to include Border Patrol use of motorized vehicles in designated wilderness; use of helicopters in designated wilderness; maintenance and upgrades of roads with “minimal” compliance under the National Environmental Policy Act, and other proposed actions that have never been publicly revealed by the Border Patrol. Border Patrol documents on this topic are clearly responsive to Plaintiff’s FOIA request, however, the Border Patrol has not located or provided them as it is obligated to do pursuant to the FOIA.

31. Despite the fact that such a failure constitutes an exhaustion of administrative remedies allowing Defenders to immediately file suit in Federal District Court, on June 30, 2004, Defenders filed an administrative appeal of the Border Patrol’s May 4, 2004, “no records” response with the Department of Homeland Security.

32. Under FOIA, the Department of Homeland Security had 20 working days to respond to this request. Now well beyond that deadline, the Department of Homeland Security has yet to respond to, or even acknowledge, this appeal.

33. Neither the Border Patrol nor the Department of Homeland Security has provided any further response to Defenders' FOIA request.

PLAINTIFF'S CLAIM FOR RELIEF:
VIOLATIONS OF FOIA

34. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

35. Plaintiffs are entitled by law to access the records requested under FOIA.

36. Defendants Border Patrol and the Bureau of Customs and Border Protection have not conducted an adequate search for records responsive to Plaintiff's request.

37. Plaintiff has exhausted its administrative remedies.

38. Defendants Border Patrol, Bureau of Customs and Border Protection, and Department of Homeland Security are in violation of the FOIA, 5 U.S.C. § 552, by failing to fully and lawfully fulfill Plaintiff's FOIA request, and by failing to respond to Plaintiff's administrative appeal.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Declare that Defendants have violated the FOIA by failing to satisfy Plaintiff's FOIA requests of April 28, 2004 and May 12, 2004;

(2) Order Defendants to immediately search for and locate records responsive to Plaintiff's FOIA requests.

(3) Order Defendants to immediately release all records responsive to Plaintiff's FOIA requests;

(4) Award Plaintiffs their costs and reasonable attorney fees and litigation costs in this action as provided for under 5 U.S.C. § 552(a)(4)(E); and

- (5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 21st day of October, 2004

/s/

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